



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Miscellaneous Civil Application 18 of 2009

ALBADAR SERVICE STATION LTD PLAINTIFF/RESPONDENT

VERSUS

MT. KENYA PETROLEUM DISTRIBUTORS LTD..... DEFENDANT

RULING

Misc. Application dated 23rd April, 2009 seeking to transfer

Principal Magistrate's case Kericho to the Chief Magistrate's court Nairobi

I: Background

1. The subject of the main suit filed in the Principal Magistrate Court on 29th June, 2007 case No. PMCC. 368/07 is that of Commercial law. The original Plaintiff/Respondent sued the Applicant/Defendant for goods bought but never delivered to them.
2. It was quite clear that the applicant opposed the court case being filed at Kericho in the Magistrate's Court. They wished for the case to be transferred to Nairobi, the law Courts Commercial Courts at Nairobi. To do this they raised a Preliminary Objection by which they claimed that the Defendant/Respondent were before the wrong court under Section 15 of the Civil Procedure Act, that deals with the place of suing.
3. They had waited for the out come of the ruling, but in vain. The reasons why the ruling was not delivered was attributed to the post election violence.
4. They then opted to come to the High Court of Kenya at Nairobi and file this Miscellaneous Application under Section 3(a) and Section 18 Civil Procedure Act seeking merely to transfer the suit to Nairobi. The argument put forward by them was identical to the Preliminary Objection raised earlier by the Applicant/Defendant.
5. This application was met with a Preliminary Objection which is the subject of this ruling.

II: Preliminary Objection

6. The application misc. 266/09 was originally filed at the High Court of Kenya at Nairobi at Milimani Court. The Hon. Judge Kimaru J declined to hear the application stating that it rightly should be heard at the High Court of Kenya at Kericho.

7. When the application was brought before this court, the two parties were permitted to peruse the Lower Court file that had been called up by this court. The applicant opted to continue with her arguments.

8. The Defendant/Applicant proceeded to inform the court that the issue raised is not that of Section 15 of the Civil Procedure Act seeking the court to determine the place a matter is to be sued but is really an issue of transfer of the magistrate case to Nairobi Law Courts. The grounds being, payment was made in Nairobi and the plaintiff, defendant and their lawyers reside in Nairobi.

9. The Plaintiff/Respondent stated that this argument is the same as that raised in the Principal Magistrate's Courts. There was therefore nothing new in the matter and the said application was Res Judicata. The Plaintiff/Respondent relied on the case law of Cheruiyot V Bartiony CA 79/1986 (1988 KLR) Platt, Apollo JJa, Masime Ag. Ja in which a land matter was determined on its merits. The respondent application was dismissed as amounting to Res Judicata. They prayed that the application be dismissed as no appeal was preferred to the Magistrate's decision.

III: Opinion

10. The post election violence interfered with the Magistrate's Court case at Kericho. The defendants were unable to obtain a ruling on their Preliminary Objection that the court case was filed in the wrong court and this, contrary to Section 15 of the Criminal Procedure Act.

11. When the ruling on the said point was finally delivered the Respondent were unaware of this. In order to expedate the matter they went to the High Court of Kenya Nairobi, Commercial Courts, who referred the case to the High Court of Kenya at Kericho. Even at the stage of hearing, the applicant was not aware of the ruling by the magistrate.

12. The issue agued of seeking a transfer amounts to the same concept of seeking to strike out the pleadings having been filed in the wrong court. I do not agree with the application before me. It was filed as a last resort to counter act a delayed ruling. The ruling by the Magistrate's Court has now been delivered. The option the appellant had is to appeal against the trial magistrate's order but not to go to other courts seeking indirectly the same orders.

13. I accordingly find and hold that the (*Misc. Application No. 18/09 originally Nairobi Misc. application 266/09*) is Res judicata. It is a matter that has been determined upon by the original Magistrate's Court. It cannot therefore come by way of a transfer under Section 18 Civil Procedure Act to another court.

14. I hereby dismiss the application with costs to the respondent.

Obiter-dictum

The new advocate appearing for the respondent should have filed a notice of change of advocate from M/S Katiku Khan advocates and not M/S Akinyi & Co. advocates

15. An amendment by the Respondent advocate should urgently be effected.

16. I award costs to the respondent.

DATED this 7th day of May, 2009 at KERICHO

M.A. ANG'AWA

JUDGE

Advocates

R.W. Nderitu Advocate instructed by M/S Muteithei Kibira advocates

for Defendant/Applicant – present

I.O. Meroka advocate instructed by M/S Meroka & Co. advocates

for the Plaintiff/Respondent - present